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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 338

IN THE MATTER OF
LEON FISCHBEIN,

Petitioner,

v.

THE BROOKLYN BAR ASSOCIATION,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

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Statement

Leon Fischbein, the petitioner herein, was admitted to the Bar of the State of New York on March 19, 1931 pursuant to statute and rules made and provided governing admission of candidates to the Bar.

On January 3rd, 1950, petitioner was disbarred by the Supreme Court of the State of New York, Appellate Division, Second Department, for professional misconduct after a hearing on charges before a Referee appointed by the Court for that purpose and after the Referee filed a report with his recommendations (*Matter of Fischbein,* 276 A. D. 268).

On May 18, 1964, petitioner moved to be reinstated as an attorney and counsellor-at-law in the State of New York. His application was referred by the Appellate Division to its Committee on Character and Fitness and thereafter the petitioner appeared and was examined as to fitness to be reinstated to practice law in New York. The report of the committee was filed with the Justices of the Appellate Division and thereafter the Justices unanimously voted to deny the application on July 12, 1965. Reargument was granted to the petitioner and on September 20th, 1965, the Court adhered to its original decision and denied reinstatement. As part of his motion to reargue, the petitioner moved to examine and inspect the report of the Character Committee. The Court denied this application.

A notice of appeal was then filed by the petitioner to the Court of Appeals of the State of New York and a motion was made in that Court for an order directing the Appellate Division of the Supreme Court to furnish the petitioner with a copy of the report or in the alternative to forward a copy of the report of the said Committee to the Court of Appeals. This motion was treated by the Court of Appeals as a motion for leave to appeal and on December 1, 1965, the Court of Appeals denied the motion on the grounds that only questions of non-reviewable discretion are involved.

Petitioner then moved to reargue the said motion and on February 17, 1966, the Court denied the motion.

This proceeding then followed and the petitioner contends that the denial of his application for reinstatement to the practice of law constitute a denial of due process and the equal protection of laws and the refusal to permit the examination and inspection of the report of the Character Committee constituted a denial of due process and that the treatment of the motion for inspection of the report as a motion for leave to appeal to the Court of Appeals, by the Court of Appeals was a denial of due process.

ARGUMENT

POINT I

The petitioner has not been denied due process.

Under New York Law (Judiciary Law, Sec. 90 (1) (a)), the Appellate Division of the State Supreme Court of each of the four judicial departments in New York has power to admit applicants to the Bar after the State Board of Law Examiners certifies that the applicant has passed the examination (or that an examination has been dispensed with), if it is "satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor at law."

The Appellate Division is required by the New York Civil Practice Law and Rules (Sec. 9404) to appoint a Committee "for the purpose of investigating the character and fitness" of applicants. No applicant may be admitted without a favorable certificate.

The New York Court of Appeals pursuant to its rule-making authority (Judiciary Law, Sec. 53(1)) has promulgated Rules for Admission of Attorneys and Counsellors-at-law which provide, *inter alia,* that every applicant must produce before the Committee "evidence that he possesses the good moral character and general fitness requisite for an attorney and counsellor-at-law" (Rule VIII-1).

In the instant case, the petitioner was formerly a member of the New York Bar. Charges of professional misconduct were brought against him and a full and open hearing was had in which he was confronted by his accusers and permitted unlimited cross-examination of witnesses and accusers. He was further afforded a full opportunity to be heard and to present witnesses on his own behalf. Thereafter he was disbarred because the charges of unprofes-

sional conduct were proved to the satisfaction of the Referee and the Appellate Division. He now seeks reinstatement to the practice of law and seeks as a matter of right what is, under the circumstances of this case, a matter of favor.

The application was referred by the Appellate Division to the Character Committee for examination into the character and fitness of the petitioner. The Committee is an advisory arm of the Court. It has no existence apart from the Court which creates it and it has no authority except that which is conferred upon it by the Appellate Division. Its findings are neither conclusive nor binding. (*Matter of Cassidy,* 268 A. D. 282, aff'd without opinion 296 N. Y. 926.) The Committee interviewed and examined the petitioner and thereafter filed a report to the Appellate Division. The petitioner concludes (although there is no proof of same) that the report was favorable to him. Thereafter the Appellate Division denied the petitioner's application and denied reinstatement to the practice of law. Petitioner claims that such refusal is unconstitutional as being a deprivation of due process. In support of his position he cites the case of *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96. That case involves a petitioner, a Certified Public Accountant, who was refused admission to practice law in the first instance because it was alleged that certain adverse statements were made about him by an attorney and because of allegedly enmity of another person with whom he had been involved in litigation and who was in the words of the petitioner in the case, "in cahoots" with two members of the Character Committee. He was never confronted by those persons, never given a hearing and never given an opportunity to cross-examine the said persons, and never given an opportunity to refute any charges made against him. It is respectfully submitted that this case is completely different than the case now before the Court. In this case, Fischbein was admitted to

the bar and practiced law. He was disbarred after a full hearing at which all accusers and witnesses were examined and cross-examined by him. He was found to be guilty of unprofessional conduct. There is no requirement that he be given a further hearing on the original charges preferred and proved. Nor is there any accuser, or charge now pending against him, nor any matter before the Character Committee or the Appellate Division which requires a hearing and confrontation of witnesses. The Character Committee interviewed petitioner and thereafter issued a report. At that interview, petitioner was presumably afforded an opportunity to present whatever proof he had, in his favor to justify his reinstatement. Nowhere is there any proof that he was denied a hearing before the Committee and denied due process.

Even assuming, *arguendo,* that the Character Committee reported petitioner is a person of good repute, such a report and finding need not compel a conclusion that petitioner is therefore entitled to be reinstated to the practice of law. The proof of the original charges and the findings and conclusions drawn therefrom by the Appellate Division may be such, and undoubtedly are such, as to forever bar petitioner's reinstatement to practice law. His good repute today does not lead to the conclusion that he is of "good moral character and general fitness requisite for an attorney and counsellor-at-law". Further the Appellate Division is not bound by the findings of the Committee.

In any event, there is no proof of charges or accusations or adverse statements made against him before the Character Committee or elsewhere that require confrontation, cross-examination or a hearing. It is respectfully submitted that the petitioner has not been deprived of due process herein.

POINT II

The refusal or failure to furnish petitioner with a copy of the report of the Committee on Character and Fitness is not a denial of due process.

Sec. 90, Subd. 10 of the Judiciary Law provides that all papers, documents and records of applicants "shall be sealed and deemed private and confidential" except that "upon good cause shown the justices of the appellate division . . . are empowered *in their discretion,* by written order, to permit to be divulged all or any part of such papers, records and documents" (Italics supplied).

Nowhere does the petitioner show "good cause" to release the report of the Committee and consequently by the very terms of the statute, the release of the report is a matter of discretion and the failure to exercise that discretion in favor of the petitioner cannot be said to be a denial of due process.

POINT III

Disbarment of the petitioner is not cruel and inhuman punishment.

As has already been stated, the Appellate Division need not follow any recommendation of the Character Committee and even assuming the Committee reported the petitioner was of good character, the refusal of the Appellate Division, in its discretion, to follow the report and reinstate the petitioner, is not cruel and inhuman. The petitioner has been disbarred for his own misconduct. Disbarment is a permanent punishment. If the disbarring court at any time, grants reinstatement to a disbarred attorney, that is a matter of favor. Its refusal to grant reinstatement cannot be said to be cruel or inhuman.

In the cases of *Sacher* and *Isserman* cited by the petitioner in his brief (*In re Sacher* v. *Association of the Bar*, 347 U. S. 388) (*In re Isserman*, 348 U. S. 1, reversing 345 U. S. 286), it was held in *Sacher* that disbarment for contempt of court was too severe and in *Isserman*, that disbarment by an evenly divided Federal Court would be reversed where the attorney had been disbarred in a State Court for contempt. Neither of these cases are similar to the case of the petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY TO RESPONDENT'S ANSWER TO PETITION FOR A WRIT OF CERTIORARI

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Reply to Respondent's Statement

The respondent sets forth the statement (p. 1)* that the petitioner was disbarred on January 3, 1950 for professional misconduct after a hearing on the charges before a Referee, and after the Referee filed a report with his recommendations. However, respondent failed to set forth those recommendations which are as follows:

> "This court's recommendation is that they** be reprimanded, directed to apologize to Judge Goldstein, District Attorney Miles McDonald, and Assist-

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* (p. 1) refers to page and number of Respondent's Answer.

** "they" referred to the petitioner and his former law partner.

ant District Attorney Nias; be ordered to pay Judge Healey the sum of $450 they received for him, and respondents be suspended for such period or periods as the Appellate Division thinks proper."

The Appellate Division disregarded those recommendations and disbarred the petitioner and his former law partner.

Reply to Point I of Respondent's Argument

The Respondent sets forth the sections of law applicable to the admission of applicants to practice law in New York (p. 3). Petitioner does not challenge the Appellate Division's authority to admit persons to practice law in New York which authority is derived from the statutes stated.

On the contrary, petitioner contends that since this judicial power is specifically created by statute, then the Appellate Division's authority is restricted to rendering decisions which afford all persons similarly situated to equal protection of the law and to due process of law.

In compliance with the provisions of Section 90 of the Judiciary Law, petitioner, after his disbarment in 1950, conducted himself in such a manner as to satisfy the requirements of said section and submitted evidence to the Appellate Division and to the Committee on Character and Fitness that he possessed the requisite character and general fitness for an attorney and Counsellor at law.

Although properly served with copies of the application for reinstatement, neither the Brooklyn Bar Association nor the Appellate Division came forward with any evidence to the contrary.

In fact the respondent concedes (p. 5) that no one appeared to offer any opposition to the application for reinstatement.

Respondent's answer (p. 4) states that the report of the Committee on Character and Fitness is neither conclusive nor binding. Petitioner does not dispute that statement. However, petitioner contends that if the Committee reported that the petitioner presently possesses the requisite character and fitness for an attorney at law, then if the Appellate Division refuses to accept the report of its own committee, it must hold a further hearing where evidence, if available, would be produced to show that petitioner did not presently possess the requisite character and fitness for an attorney at law.

The failure to order such a hearing, before denying petitioner's application, constituted a denial of due process of law.

The argument of respondent on page 4 of its answer that the Appellate Division has the power to admit a person to practice as a "matter of favor" has no basis in law whatever. The Appellate Division has the power to exercise its discretion whether or not to re-admit petitioner to the practice of law, but that discretion cannot be arbitrarily or capriciously exercised and the exercise of this discretion must be based on evidence before it. The petitioner has a constitutional right to the equal protection of the law and to be treated as all other persons similarly situated have been treated, without favor and in accordance with the laws of the State of New York and the Constitution of the United States.

The petitioner concedes that if the report and recommendations of the Committee on Character and Fitness are not favorable to him, then his constitutional rights have not been violated.

On page 4 of the respondent's answer, it is stated:

> "the petitioner concludes (although there is no proof of the same) that the report was favorable to him".

The respondent, even at present, will not affirmatively state whether or not the report is favorable to the petitioner.

Reply to Point II of Respondent's Argument

Under Point II, the respondent on page 6 of its answer, sets forth a portion of Section 90, Subdivision 10 of the Judiciary Law as authority for not disclosing to the petitioner the contents of the report of the Committee on Character and Fitness.

The purpose of the said section is to protect the reputation of attorneys in the event charges against them are not sustained. The statute involved is set forth in the petition for certiorari on page 24. The portion of said section not quoted by the respondent, reads as follows:

> "without regard to the foregoing, in the event that the charges are sustained by the Justices of the Appellate Division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of an attorney, the records and documents in relation thereto shall be deemed public records."

The original disciplinary proceeding in 1950 was conducted as a public hearing. Since the charges were sus-

tained against petitioner in 1950, the record became a public record. There were no other charges brought against the petitioner since 1950.

This proceeding for reinstatement was instituted by the petitioner. The Appellate Division, by its order, referred the application for readmission to the Committee on Character and Fitness to investigate, conduct hearings, and to report with its recommendations. The Appellate Division, after receiving the report and recommendations of the Committee on Character and Fitness, entered an order denying reinstatement and stated therein *"and due deliberation having been had thereon it is ordered that the application for reinstatement as an attorney and counsellor at law be and the same hereby is denied."* (Italics supplied by petitioner)

The Appellate Division, by its original order referring this application to the Committee on Character and Fitness, and its final order predicated on the report of said Committee, has violated the petitioner's constitutional rights to due process of law and equal protection of the law, unless it can be shown that the report of the Committee was unfavorable to the petitioner.

If, therefore, the report and recommendations were favorable to the petitioner, then the order of the Appellate Division denying reinstatement was (1) not predicated on the Committee's report. (2) The Appellate Division acted arbitrarily and capriciously and thereby denied the petitioner due process of law and equal protection of law. Further if Section 90, Subdivision 10 of the Judiciary Law has for its purpose the protection of the reputation of attorneys in the event charges are not sustained, then the Appellate Divi-

sion, by its refusal to make public, or to permit petitioner to examine the report of the Committee on Character and Fitness, defeats that which it seeks to accomplish. If anything, the reputation of the petitioner is further damaged if this report is not made available to him. The refusal to furnish petitioner with a copy of the report of the Committee on Character and Fitness for purposes of appeal and review by higher Courts constitutes a denial of due process of law.

If the report of the committee, upon which the Appellate Division duly deliberated, shows that he does not possess the character and fitness for admission to the practice of law, then certainly the record and documents in relation to this application should be deemed a public record.

Reply to Point III of Respondent's Answer

Under Point III, the respondent's answer states (p. 6) that *"disbarment is a permanent punishment. If the disbarring court at any time grants reinstatement to a disbarred attorney, that is a matter of favor"* (Italics supplied by petitioner).

The Appellate Division does not have any legal right or power to grant "favors". Favors became non-existent with the abolition of "Star Chamber Proceedings" wherein kings and feudal lords granted favors to their subjects and serfs. The Appellate Division has the right, in the proper exercise of its discretion and in accordance with due process of law, to refuse to reinstate a disbarred attorney. However, this discretion must not be arbitrarily, capriciously or whimsically exercised. This discretion must be equally ex-

ercised to all persons similarly situated, without favor and in accordance with due process of law. The courts of our many States have consistently and on innumerable occasions invoked the principle that a disbarred attorney, after a lapse of reasonable time, may be reinstated by the court which disbarred him if at the time of the application for reinstatement he establishes, by his mode of living, and by the testimony of others, that he has rehabilitated himself and that he is possessed of the good moral character requisite for the practice of law.

The Court is respectfully referred to the cases cited on Pages 10 and 11 of the Petition for Certiorari wherein the same Appellate Division of the Supreme Court, Second Department, has reinstated, in less than fifteen years, persons who were disbarred for actions which constituted crimes. The specifications of misconduct for which the petitioner was disbarred did not constitute any crime, but constituted unprofessional conduct.

The California State Supreme Court, in the *Matter of Gaffney,* 171 Pac. 2d, 873; 28 Cal. 2d, 769, stated as follows:

> "* * * the law is interested in the regeneration of erring attorneys; and in the enforcement of a sound discipline, its disposition ought not to place unnecessary burdens upon them. The door of hope should no more be conclusively or finally shut as to them than it should be thus closed as against any other person who has erred and consequently may have suffered a somewhat similar penalty through the disciplinary functioning of the law. Reformation and regeneration are open to any man and, when effected, should merit a just reward * * *".